FILED

97-283 JUN 20 1997

OFFICE OF THE CLERK

No. 97-___

In The
Supreme Court of the United States
October Term, 1996

LEONARD DAVID STEVENS,

Petitioner,

v.

GARY JOHNSON, Director, Texas Department of Criminal Justice Institutional Division,

Respondent.

Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Third Circuit

PETITION FOR A WRIT OF CERTIORARI

Leonard David Stevens
630 Sherri Oak Lane
Apt. 110
Arlington, TX 76012
(817) 469-8794

30 pp

QUESTIONS PRESENTED

The question presented for review is whether the United States Court of Appeals for the Fifth Circuit abused its discretion, and legally erred, in denying Petitioner a Certificate Of Appealability pursuant to 28 U.S.C. S2253(c)(2), and whether the decision of the Court of Appeals below is contrary to 28 U.S.C. S2253(c)(2) and established jurisprudence of this Honorable Court.

PARTIES TO THE PROCEEDINGS

The parties to this instant 'certiorari' matter are as follows:

PETITIONER, PRO SE
Leonard David Stevens
630 Sherri Oak Lane
Apt. 110
Arlington, TX 76012

RESPONDENT
Gary Johnson, Director
Texas Department of Criminal Justice Institutional Division
P.O. Box 99
Huntsville, TX 77340

ATTORNEY FOR RESPONDENT
Kristen L. Worman
Assistant Attorney General
P.O. Box 12548
Austin, TX 78711-2548

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
PARTIES TO THE PROCEEDINGS	ii
TABLE OF AUTHORITIES	v
OPINIONS BELOW	1
JURISDICTION	1
CONSTITUTIONAL AND STATUTORY PROVISIONS	2
STATEMENT OF THE CASE	2
REASONS FOR GRANTING CERTIORARI	3
PRAYER FOR RELIEF	11
APPENDICES	
APPENDIX A: Proposed Findings, Conclusions and Recommendations of the United States Magistrate Judge and Notice and Order, filed July 31, 1996	1a
APPENDIX B: Order Adopting Magistrate Judge's Findings and Conclusions With Special Instructions to Clerk of the Court, filed September 26, 1996	6a

TABLE OF CONTENTS - Continued

Page

APPENDIX C:
Final Judgment, filed September 26, 1996..... 9a

APPENDIX D:
March 24, 1997 'Order' of the United States Court of Appeals for the Fifth Circuit..... 10a

APPENDIX E:
Constitutional and Statutory Provisions Involved..... 12a

TABLE OF AUTHORITIES

Cases	Page
Barefoot v. Estelle, 463 U.S. 880 (1983).....	3,10
Drinkard v. Johnson, 97 F.3d 751 (5th Cir. 1996).....	10
Ex Parte Duffy, 607 S.W. 2d 507 (Tex. Crim. App. 1980).....	6
Hernandez v. State, 800 S.W. 2d 253 (Tex. Crim. App. 1990).....	8
Jones v. State, 641 S.W. 2d 545 (Tex. Crim. App. 1982).....	8,9
Lockhart v. Fretwell, 113 S.Ct. 838 (1993).....	6
Lopez v. State, 860 S.W. 2d 938 (Tex. App.).....	8
Lozada v. Deeds, 111 S.Ct. 860 (1991).....3,10	
Rummel v. Estelle, 498 F.Supp. 739 (W.D. Tex. 1980).	6
Spriggs v. Collins, 993 F.2d 85 (5th Cir. 1993).....	9
Strickland v. Washington, 466 U.S. 668 (1984).....	6
Teague v. Scott, 60 F.3d 1167 (5th Cir. 1995).....	9
Vela v. Estelle, 708 F.2d 954 (5th Cir. 1983).....	8
Wagner v. State, 687 S.W. 2d 303 (Tex. Crim. App. 1985).....	8

TABLE OF AUTHORITIES - Continued

Page

OTHER AUTHORIES:

Constitutional Amendment VI..... 7

Constitutional Amendment XIV..... 7

28 U.S.C. S2253(c)..... 3

28 U.S.C. S1254(1)..... 1

Fed. R.App. Proc., Rule 22(b)..... 4

PETITION FOR A WRIT OF CERTIORARI

Leonard David Stevens ("Petitioner"), proceeding pro se, seeks a writ of certiorari to review an order of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

Appendix A is a true and correct copy of the Proposed Findings, Conclusions and Recommendation of the United States Magistrate Judge and Notice and Order, filed in the District Court below on July 31, 1996.

Appendix B is a true and copy of the District Court's Order Adopting Magistrate Judge's Findings and Conclusions (With Special Instructions to Clerk of the Court), signed by the United States District Judge below, on September 25, 1996.

Appendix C is a true and correct copy of the District Court's Final Judgment signed on September 25, 1996.

Appendix D is a true and correct copy of the March 24, 1997 Order of the United States Court of Appeals for the Fifth Circuit, in that court's appeal number 96-111273.

JURISDICTION

On March 24, 1997 the United States Court of Appeals for the Fifth Circuit filed its Order denying Petitioner a Certificate of Appealability. This Honorable Court has jurisdiction over this certiorari matter pursuant to 28 U.S.C. S1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The pertinent Constitutional and Statutory provisions involved are set forth at Appendix E, attached to this Petition.

STATEMENT OF CASE

Petitioner was indicted in cause number 0344427A, in Criminal District Court Number 1 of Tarrant County, Texas, for the manufacture of amphetamines weighing more than 28 grams but less than 400 grams. On October 26, 1989, a jury found Petitioner guilty as charged in the indictment and assessed his punishment at eighty-five (85) years imprisonment. Petitioner was represented at trial by attorney David Bays ("Bays").

The state Court of Appeals for the Second Judicial District of Texas affirmed Petitioner's conviction on April 30, 1991. *Stevens v. State*, No. 02-90-112-CR. Thereafter, Petitioner filed one state application for writ of habeas corpus, which the Texas Court of Criminal Appeals of Texas denied without written order on November 8, 1995. *Ex Parte Stevens*, No. 29,742-01.

Petitioner filed his instant federal application for writ of habeas corpus, pursuant to 28 U.S.C. S2241, et. seq., in the District Court below on February 5, 1996. The Respondent filed an answer to the federal petition.

On July 31, 1996 the United States Magistrate Judge filed his Proposed Findings, Conclusions, and Recommendations of the United States Magistrate Judge and Notice and Order'. See Appendix A.. Both the Petitioner and the Respondent then filed their objections to

the Magistrate's said findings, conclusions and recommendation.

By order signed on September 25, 1996 the District Judge adopted the findings and conclusions of the Magistrate Judge. See Appendix B. The District Court also entered its Final Judgment in the case on September 25, 1996. See Appendix C.

Petitioner gave timely notice of appeal, and moved in the District Court for a Certificate of Appealability. The District Court denied the Certificate of Appealability. Petitioner paid the filing fee in the Fifth Circuit Court of Appeals.

After obtaining an extension of time in which to file his appellate brief in the Fifth Circuit Court of Appeals, Petitioner filed his appellate brief, which contained a Request for Certificate of Appealability in the Fifth Circuit Court of Appeals during January, 1997.

On March 24, 1997 a single Justice of the Fifth Circuit Court of Appeals denied Petitioner's request for a Certificate of Appealability. See Appendix D. This instant Petition for Writ of Certiorari follows.

REASONS FOR GRANTING CERTIORARI

This Honorable Court should grant certiorari to review the March 24, 1997 Order of the Fifth Circuit Court of Appeals, See Appendix D, because the decision of the court of appeals is contrary to 28 U.S.C. S2253(c)(2), this court's decision in *Lozada v. Deeds*, 111 S.Ct. 860 (1991), *Barefoot v. Estelle*, 463 U.S. 880 (1983), as well as other precedent of this Honorable Court.

Rule 22(b) of the Federal Rules of Appellate Procedure commands that a District or Circuit Judge must issue a Certificate of Appealability, pursuant to 28 U.S.C. S2253(c), before a person convicted of a state felony offense may take an appeal in a habeas corpus case from federal district court to a federal court of appeals. 28 U.S.C. S2254(c)(2) provides that the Certificate of Appealability may issue where the petitioner makes a substantial showing of the denial of a (federal) constitutional right. Thus, the standard for issuance of a Certificate of Appealability is a codification of the standard for the issuance of a Certificate of Probable Cause under prior law, as set forth in this court's decisions in *Lozada v. Deeds, supra,* and *Barefoot v. Estelle, supra.*

In *Lozada v. Deeds, supra,* this court affirmatively held that a court of appeals' order on whether to issue a Certificate of Probable Cause (now the Certificate of Appealability) must cite the relevant authority controlling the Petitioner's claim underlying his request for a Certificate of Appealability.. At bar, the Fifth Circuit's March 24, 1997 Order denying Petitioner the Certificate of Appealability failed to cite any controlling authority with regard to whether Petitioner has made a substantial showing of the denial of a federal constitutional right. The court of appeals' order simply stated, in a cursory manner, that Petitioner had failed to make a substantial showing of the denial of a federal constitutional right. See Appendix D. The Fifth Circuit's order made no reference to any controlling law on the issues raised by Petitioner in his federal habeas corpus petition.

PETITIONER'S SUBSTANTIAL SHOWING OF THE DENIAL OF A CONSTITUTIONAL RIGHT

In ground for relief number one of his instant habeas 'petition' Petitioner contends that he was denied the

effective assistance of counsel for his defense during the state criminal proceedings. In this regard Petitioner complains of two critical omissions on the part of his trial counsel, Rays, i.e., the failure of Rays to secure the testimony of a material defense witness, Robert V. McDonald ("McDonald"), and the failure of Rays to challenge the qualifications (admissibility) of two prosecution reputation witnesses put on by the state at the punishment phase of the trial in order to obtain a harsher punishment.

A. Petitioner's habeas allegations reflect that McDonald, who was a co-defendant in the drug case against Petitioner, was tried and convicted of the same offense some time prior to Petitioner's trial. McDonald was in fact arrested in the house where Petitioner resided and was charged with a felony offense based upon the same drugs and drug paraphernalia that was recovered from that house. Defense counsel had in fact interviewed McDonald prior to Petitioner's trial. During that interview, McDonald expressed his willingness to testify for Petitioner's defense. Had McDonald been called to testify for the defense, he would have testified that when he and several others, including the Petitioner, were arrested at the house on the drug charge, all drugs and drug paraphernalia found and confiscated by the police belonged to the Petitioner. At the time of the arrest McDonald was subleasing a portion of the property from the Petitioner.

Further, the plea records in McDonald's case, cause number 0344421A, in which he was convicted of the felony offense of "possession of a controlled substance", reflect that McDonald informed the convicting court that he, McDonald, was the exclusive possessor and owner of all drugs and drug paraphernalia found and seized by police at the house. During Petitioner's trial, defense attorney

Bays attempted to introduce into evidence the conviction and plea documents from the McDonald conviction. However, the trial court denied the request for such admission.

Under this court's decision in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052 (1984), a Petitioner claiming a Sixth Amendment violation due to the ineffectiveness of counsel must show that his counsel's representation fell below an objective standard of reasonableness, and that, but for counsel's unprofessional errors, the result of the proceeding would have been different. Id, 104 S.Ct. at 2065, 2068; See also *Lockhart v. Fretwell*, 113 S.Ct. 838, 844 (1993). The United States Magistrate misapplied *Strickland* to the facts of Petitioner's case. The Magistrate agreed with the state habeas court - that the failure of defense counsel to call McDonald to testify was "reasonable trial strategy". See Appendix A. Under existing law and prevailing norms of attorney performance at the time of Petitioner's trial, a reasonably effective defense attorney had a duty to present all available evidence and testimony in support of his client's defense. *Ex Parte Duffy*, 607 S.W. 2d 507 (Tex. Crim. App. 1980); *Rummel v. Estelle*, 498 F.Supp. 739 (W.D. Tex. 1980). It is absurd to hold, as did the state habeas court and the United States Magistrate Judge, that on the one had Petitioner's defense counsel had a "trial strategy" of shifting the responsibility for the manufacture of the drugs to McDonald, but that the failure to call McDonald to testify in support of that trial strategy constituted "sound trial strategy". See Appendix A. For an objectively reasonable defense attorney to refuse to secure the attendance of an available, critical witness to support the only defensive theory in the case is per se unreasonable under *Strickland*. It is clear that defense counsel in this case was well aware of the information possessed by McDonald - information which was wholly exculpatory as

to the Petitioner. There is no question but that had the defense counsel called McDonald to testify, and the jury credited McDonald's testimony, the jury would not have found Petitioner guilty of the offense with which he was charged. There is certainly a "reasonable probability" that the outcome of the trial would have been difference had McDonald testified for the defense.

Petitioner presented the foregoing arguments to the Fifth Circuit Court of Appeals, as contained in this Brief of the Appellant, in support of his request for a Certificate of Appealability. The Fifth Circuit Court of Appeals abused its discretion in denying Petitioner the Certificate of Appealability because Petitioner demonstrated the substantial denial of a federal constitutional right - his Sixth and Fourteenth Amendment Rights to the effective assistance of counsel for his defense. See 28 U.S.C. S2253(c).

B. In his instant federal Petition Petitioner also complains of his defense attorney's failure, during the punishment phase of the state trial, to request and conduct an out-of-the-jury hearing to test the qualifications of the prosecution's reputation witnesses.

During the punishment phase of the trial the prosecution, in order to obtain a harsher sentence, put on two law enforcement persons to testify as to the bad reputation of the Petitioner. Doug Peters, a police captain employed by the City of Kennedale, Texas, testified that Petitioner had a bad reputation in Petitioner's community for being peaceable and law-abiding. Gary Arnold, employed by the Johnson County, Texas Sheriff's Department, testified that Petitioner had a bad reputation in Petitioner's community for being peaceable and law-abiding. No prior criminal record of the Petitioner was into introduced into evidence during the punishment phase of the

trial, as Petitioner had not previously been convicted of any felony offense. Texas courts hold that bad reputation testimony is prejudicial to a defendant. See *Lopez v. State*, 860 S.W. 2d 938 (Tex. App.).

A reputation witness must have substantial familiarity with the reputation of a defendant in the community in which the defendant resides in order to qualify to testify as to that reputation. *Hernandez v. State*, 800 S.W. 2d 523 (Tex. Crim. App. 1990). Substantial familiarity with a defendant's bad acts is not the same as substantial familiarity with a defendant's reputation. Id. In order to test the qualifications of a prosecution's proposed reputation witnesses, a competent Texas defense attorney requests an out-of-the-jury presence hearing in order to test the qualifications of the witnesses to so testify. *Jones v. State*, 641 S.W. 2d 545 (Tex. Crim. App. 1982). Law enforcement persons are suspect reputation witnesses because they ordinarily only have knowledge of a defendant's bad acts, and the testimonies lack trustworthiness and the synthesis of observations over a period of time which would qualify them as bonafide witnesses. *Hernandez v. State, supra; Wagner v. State*, 687 S.W. 2d 303 (Tex. Crim. App. 1985).

In Petitioner's case, not only did his defense counsel fail to request an out-of-the-jury presence hearing to test the qualifications of the law enforcement reputation witnesses, but the witnesses did not even live in the same community as did the Petitioner. They were per se unqualified to testify as to the reputation of the Petitioner. As the Fifth Circuit Court of Appeals has held, "each item of testimony has an incremental effect on the sentence". Segments of highly prejudicial, inadmissible testimony has a considerable effect on the sentence, skewing the calculus and invalidating the result reached in sentencing. *Vela v.*

Estelle, 708 F.2d 954, 966 (5th Cir. 1983), *cert. denied*, 104 S.Ct. 736 (1984).

The state habeas court misunderstood the applicable law regarding prosecution reputation witnesses. In its findings the state habeas court held that defense counsel did not cross-examine the reputation witnesses because he feared "opening the door" to "have your heard" questions by the state during redirect examination. However, a hearing to test the qualifications of proposed reputation witnesses is held out-of-the-presence of the jury. *Jones v. State, supra*. Thus, there could not have been any "opening the door" to "have you heard" questions before the jury because the hearing to test the qualifications of the witnesses would have occurred in the presence of the jury. The United States Magistrate Judge apparently had a similar misconception of Texas reputation jurisprudence. The Magistrate credited an affidavit of trial counsel which was filed during the state habeas proceedings. In that affidavit, defense counsel stated that "he clearly recalled that Petitioner had the kind of criminal history that would give rise to a bad reputation in both Kennedale County and Johnson County." See Appendix A. Criminal history, or 'bad acts', cannot form the basis of being qualified to testify as to a defendant's reputation. *Hernandez v. State, supra*. Nor did the two law enforcement persons even live in the same community as did the Petitioner. The two witnesses were clearly not qualified to testify as to the 'bad reputation' of the Petitioner. Their testimonies had the direct effect of contributing to the harsh punishment imposed.

Under the *Strickland* test for counsel effectiveness, a reviewing court must determine whether there is a reasonably probability that, but for counsel's error(s), the defendant's sentence would have been less severe. *Spriggs v. Collins*, 993 F.2d 85, 87-88 (5th Cir. 1993); *Teague v.*

Scott, 60 F.3d 1167, 1171 (5th Cir. 1995). In Petitioner's case, the result of the sentencing proceeding would have been different had the unqualified reputation witnesses not testified for the prosecution. Petitioner has demonstrated, as he did to the Fifth Circuit Court of Appeals in the context of requesting a Certificate of Appealability, that his Sixth and Fourteenth Amendment Rights under the federal Constitution were violated, and that he was substantially prejudiced by that Constitutional violation. Thus, the Fifth Circuit Court of Appeals abused its discretion when it denied Petitioner a Certificate of Appealability. See 28 U.S.C. S2253(c).

This Honorable Court has not yet issued a published opinion with regard to the standard governing the issuance of the Certificate of Appealability under 28 U.S.C. S2253(c). The court of Appeals below has determined that the proper test for the granting of a Certificate of Appealability is that contained in the statute itself, 28 U.S.C. S2253(c), although the Court of Appeals also makes reference to this court's prior jurisprudence regarding the Certificate of Probable Cause. See *Drinkard v. Johnson*, 97 S.Ct. 751 (5th Cir. 1996), *cert. denied*, (U.S. Mar. 3, 1997) (No. 96-7359). See Appendix D. This court should grant certiorari not only because the Court of Appeals below improperly denied Petitioner a Certificate of Appealability, but to clarify the standard under which the Certificate of Appealability may issue, in light of this court's prior decisions in *Lozada v. Deeds*, *supra*, and *Barefoot v. Estelle*, *supra*. The Court of Appeals' March 24, 1997 Order denying Petitioner a Certificate of Appealability, see Appendix D, gives no underlying rationale as to why the single justice of the Court of Appeals denied the Certificate of Appealability without the justice of the Court of Appeals stating reasons (or rationale) for such denial, is inconsistent with 28 U.S.C. S2253(c)

and this court's prior decisions in *Lozada v. Deeds* and *Barefoot v. Estelle.*

PRAYER FOR RELIEF

This Honorable Court should grant Certiorari to review the March 24, 1997 Order of the Fifth Circuit of Appeals, Appendix D. The said March 24, 1997 Order should be vacated, with instructions to the Court of Appeals to grant Petitioner a Certificate of Appealability for his present habeas appeal. Petitioner prays for such relief in his favor which is in the interest of justice and consistent with the relief sought in this Petition.

Respectfully submitted,

Leonard David Stevens
630 Sherri Oak Lane
Apt. 110
Arlington, TX 76012

Petitioner

APPENDIX A

Filed July 31, 1996

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

CA No. 4-96-CV-89-Y

LEONARD DAVID STEVEN,
Petitioner,

v.

GRAY JOHNSON, Director,
T.D.C.J., Institutional Division,
Respondent.

PROPOSED FINDINGS, CONCLUSIONS AND RECOMMENDATIONS OF THE UNITED STATES MAGISTRATE JUDGE AND NOTICE AND ORDER

Pursuant to the provisions to Title 28, United States Code, Section 636(b), implemented by a miscellaneous order of the Court, this case has been referred to the United States Magistrate Judge. The Findings, Conclusions and Recommendation of the United States Magistrate Judge are as follows:

FINDINGS AND CONCLUSIONS

A. Statement of Case.

Petitioner was indicted in cause number 0344427A in Criminal District Court No. 1 of Tarrant County, Texas

for the manufacture of amphetamines weighing more than 28 grams but less than 400 grams. On October 26, 1989, a jury found Petitioner guilty as charged and assessed his punishment at eighty-five (85) years incarceration. The Court of Appeals for the Second Judicial District of Texas affirmed Petitioner's conviction on April 30, 1991. *Stevens v. State*, No. 02-90-112-CR. Petitioner filed a state application for writ of habeas corpus, which the Texas Court of Criminal Appeals denied without written order on November 8, 1995. *Ex Parte Stevens*, No. 29,742-01.

B. Examination of Arguments.

Petitioner asserts that he was deprived of effective assistance of counsel because his counsel: (1) did not secure the defense witness to testify; and, (2) his counsel did not request or conduct a hearing outside the presence of the jury to test the qualifications of the prosecution's reputation witnesses. For counsel to be ineffective, the representation must be deficient and result in prejudice. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). There is a presumption that the challenged actions might be sound trial strategy. Id. at 687-89. The petitioner must show that there is a reasonable probability that, but for counsel's alleged unprofessional errors, the result of the proceeding would have been different. Id. at 694. A reasonable probability is one sufficient to undermine confidence in the outcome of the proceedings. Id. Strategic choices made after thorough investigation are virtually unchallengeable, and such choices made after less than complete investigation are reasonable to the extent that reasonable professional judgments support the limitations on investigation. Id. at 690-91. The burden of proof in a habeas proceeding is on petitioner by a preponderance of the evidence. *Rhodes v. Estelle*, 582 F.2d 972, 973 (5th Cir. 1978).

Petitioner asserts that his counsel should have called Robert V. McDonald, a co-defendant who had been tried and convicted prior to Petitioner's trial, to testify. The trial court found, however, that Petitioner's counsel had a trial strategy of shifting the responsibility for the manufacture of the drugs to McDonald. *Ex Parte Stevens*, No. 29-742-01, pgs. 16, 19. The trial court also found that Petitioner left his trial during the sentencing phase and did not return. Id. The decision as to whether to call McDonald to testify was a question of trial strategy. Petitioner has not overcome the presumption that his counsel's action was sound trial strategy. This argument is without merit.

Petitioner also asserts that his counsel was ineffective for not qualifying the State's two reputation witnesses, Doug Peters, a police captain, and Gary Arnold, an officer with the Johnson County Sheriff's Department. Each officer testified that Petitioner had a bad reputation for being peaceful and law-abiding in the respective communities. (SF. Vol. V, pgs. 3-4, 5-6). In response to Petitioner's state application for writ of habeas corpus, Petitioner's counsel testified by affidavit that he was reasonably certain that he had interviewed the police officers. He further testified by affidavit that he clearly recalled that Petitioner had the kind of criminal history that would give rise to a bad reputation in both Kennedale County and Johnson County. *Ex Parte Stevens*, No. 29,742-01, pg. 17. The trial court accepted counsel's testimony. Id. at 19. Petitioner has not shown that his counsel erred or that the result of his trial might have been different if his counsel had tested the qualifications of the reputation witnesses.

RECOMMENDATION

This Court recommends that Petitioner's petition for writ of habeas corpus be denied.

NOTICE OF RIGHT TO OBJECT TO PROPOSED FINDINGS, CONCLUSIONS AND RECOMMENDATION AND OF CONSEQUENCES OF FAILURE TO OBJECT

Under 28 U.S.C. S636(b)(1), each party to this action has the right to serve and file within ten (10) days after the party has been served with a copy of this document, written objections to the United States Magistrate Judge's proposed findings, conclusions and recommendation. The court is hereby extending the deadline within which to file written objections to the United States Magistrate Judge's proposed findings, conclusions and recommendation until August 21, 1996. Failure to file written objections within the specified time shall bar a party, except upon grounds of plain error, from attacking on appeal any unobjected-to proposed factual finding or legal conclusion accepted by the district court. *Douglass v. United Services Auto. Ass'n*, 79 F.2d 1415, 1428-29 (5th Cir. 1996).

ORDER

Pursuant to Section 636 of Title 28, United States Code, it is hereby ORDERED that each party is granted until August 21, 1996, to serve and file with the court written objections to the United States Magistrate Judge's findings and recommendation. It is further ORDERED that the above-styled and numbered action, previously referred to the United States Magistrate Judge for findings, conclusions and recommendation, be and hereby is, returned to the docket of the United States District Judge.

BY THE COURT:

/s/ Illegible
UNITED STATES
MAGISTRATE JUDGE

DATED: JULY 31, 1996

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

Filed September 26, 1996

CA No. 4:96-CV-089-Y

LEONARD DAVID STEVENS,
Petitioner,

v.

GARY JOHNSON, Director,
T.D.C.J., Institutional Division,
Respondent.

ORDER ADOPTING MAGISTRATE JUDGE'S FINDINGS AND CONCLUSIONS (With Special Instructions to Clerk of the Court

The Court has made an independent review of the following matters in the above-styled and numbered cause:

1. The pleadings and record;

2. The proposed findings, conclusions, and recommendations of the United States Magistrate Judge filed on July 31, 1996;

3. The Respondent's written objections to the proposed findings, conclusions and recommendation of the United States

Magistrate Judge with brief in support filed on August 19, 1996;

4. The Petitioner's written objections to the proposed findings, conclusions, and recommendations of the United States Magistrate Judge filed on September 16, 1996.

The Court, after de novo review, finds and determines the Petitioner's petition for writ of habeas corpus should be denied for the reasons stated in the magistrate judge's findings and conclusions. The Court writes further to address the Respondents contention that the magistrate judge should have applied the Antiterrorism and Effective Death Penalty Act of 1996.

Respondent objects to the magistrate judge's failure to apply the Antiterrorism and Effective Death Penalty Act of 1996, Pub.L. No. 104-132, 110 Stat. 1214 ("AEDPA"). The Respondent contends that the AEDPA was effective on the date of its April 24, 1996 signature by the President, and that it should thus be applied to this case. (Respondent's Objection pp. 1-2.) The Respondent acknowledges, however, that the magistrate judge's recommendation that the instant petition should be denied is not changed by the AEDPA. Also, the Respondent has not directed this Court to a particular amendment within the AEDPA that would alter the analysis and conclusions of the magistrate judge.

The Court of Appeals for the Fifth Circuit has declined to address whether Congress intended the general provisions of the AEDPA to apply to pending cases. *See Boyle v. Johnson*, No. 95-10802, 1996 WL 466948 at *5 (5th Cir. August 16, 1996); *see also Callins v. Johnson*, 89F.3d 210, 216 (5th Cir. 1996) (declining to address whether the AEDPA applies where it would make no

difference in the outcome of the case). Guided by these decisions, because the AEDPA would not affect the outcome of the instant case, the Court declines to determine whether the AEDPA applied to this pending case.

It is therefore ORDERED that the findings, conclusions, and recommendation of the magistrate judge be, and are hereby, ADOPTED.

It is further ORDERED that Petitioner's Petition for Writ of Habeas Corpus be, and is hereby DENIED.

It is further ORDERED that the clerk of the Court shall transmit a copy of this order to Petitioner by certified mail, return receipt requested.

BY THE COURT:

/s/Terry R. Means
Terry R. Means
United States District Judge

DATED: SEPTEMBER 25, 1996

APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

Filed September 26, 1996

CA No. 4:96-CV-089-Y

LEONARD DAVID STEVENS,
Petitioner,

v.

GARY JOHNSON, Director,
T.D.C.J., Institutional Division,
Respondent.

FINAL JUDGEMENT

Pursuant to an order issued this same day, and Federal Rule of Civil Procedure 58,

It is, hereby, ORDERED, ADJUDGED, and DECREED that Petitioner's Petition for Writ of Habeas Corpus be, and is hereby DENIED.

It is further ORDERED that all costs of court are taxed against the party that incurred same.

BY THE COURT:

/s/Terry R. Means
Terry R. Means
United States District Judge

DATED: SEPTEMBER 25, 1996

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

Filed March 24, 1997

No. 96-11273
USDC No. 4:96-CV-89-Y

LEONARD DAVID STEVENS,
Plaintiff-Appellant,

v.

GARY L. JOHNSON, Director,
T.D.C.J., Institutional Division,
Respondent-Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS

ORDER

Leonard David Stevens (#19325-077) has moved for a certificate of appealability ("COA") authorizing an appeal from the district court's order denying his federal petition for a writ of habeas corpus. Stevens contends that his attorney rendered ineffective assistance in failing to call his codefendant as a witness to testify that the drugs and lab equipment found in the house in which Stevens and McDonald were arrested belonged to McDonald and not to Stevens. Stevens also contends that his attorney rendered

ineffective assistance in failing to qualify two reputation witnesses called by the state during the punishment phase of the trial. Stevens has failed to make a substantial showing of the denial of a federal constitutional right as to these issues. *See Drinkard v. Johnson*, 97 F.3d 751, 754-56 (5th Cir. 1996), *cert. denied*, (U.S. March 3, 1997) (No. 96-7359). Steven's application for COA is DENIED.
10a

BY THE COURT:

/s/Rhesa H. Barksdale
Rhesa H. Barksdale
United States Circuit Judge

APPENDIX E

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Constitutional Amendment VI - provides, in pertinent part, that "In all criminal prosecutions, the accused shall...have the assistance of counsel for his defense."

Constitutional Amendment XIV (Section 1) - provides that...no state shall make or enforce any law which shall abridge the privileges, immunities or citizens of the United States; nor shall any state deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

28 U.S.C. S2253(c)(1)(A)(2) provides that a certificate of appealability may issue only if the applicant had made a substantial showing of the denial of a Constitutional right.

Rule 22(b) of the Federal Rules of Appellate Procedure provides that a District Judge must issue a certificate of appealability, pursuant to 28 U.S.C. S2253(c), in order for a habeas applicant to take an appeal. If the District Judge has denied the certificate, the applicant may then request issuance of the certificate by a circuit judge. Such a request may be addressed to the court of appeals.